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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-706

VINCENT PACELLI, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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The petitioner, Vincent Pacelli, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 23, 1974.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 23, 1974. On October 21, 1974,

petitioner's counsel filed a timely application for extension of time to file the petition predicating it upon the complexity of the issues and an inability to communicate with petitioner who, for the previous three weeks, had been and still was incommunicado and in transit in the federal prison system. In a letter from the Clerk's office dated October 30, however, it was reported that Mr. Justice Marshall had denied the application "for failure to comply with Rule 34(2)."

It is respectfully submitted that the application did comply with Rule 34(2) inasmuch as it revealed that counsel had been unable, because of the mechanics of the federal prison system, to confer with his client concerning the filing of the petition.

In any event, since this petition is from a decision affirming a federal criminal conviction, and the 30-day limit is imposed by this Court's Rule 22(2), there is no jurisdictional bar to entertaining the petition. *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969). It is urgently submitted that there are good grounds for doing so. There was good cause for the requested extension and had counsel had access to his client, an earlier application could have been filed. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. *Whether trial of petitioner on the indictment below violated his rights against double jeopardy, deprived him of due process and a speedy prosecution, and was inconsistent with fair and efficient judicial administration.*

2. *Whether it is prejudicial error with respect to substantive counts in an indictment to combine them for trial and jury determination with a conspiracy count which was barred by the Fifth Amendment's Double Jeopardy Clause.*

STATEMENT OF THE CASE

Petitioner, along with four other defendants, was tried in the Southern District of New York in December, 1973. The indictment charged petitioner with conspiring with thirteen named defendants to violate federal narcotics laws from January 1, 1971 to September 20, 1973. Petitioner was also charged with six substantive counts which alleged possession for distribution of cocaine and heroin at various times in 1971. Trial was by jury.

At the close of the Government's case, the trial judge acquitted petitioner on one substantive count (count 4). The jury found petitioner not guilty on all three substantive counts charging possession of cocaine (counts 3, 5 and 7) but convicted him on the conspiracy count (count 1) and the two remaining counts (counts 2 and 6).

Petitioner was sentenced to fifteen years in prison on each of the three counts upon which he had been convicted, the sentence to run concurrently but consecutive to a twenty-year sentence imposed upon petitioner in 1972, by the same trial judge, in the same district.

On appeal, petitioner argued, as he had in the District Court, that the conspiracy count was barred by the Fifth Amendment's prohibition against double jeopardy, being substantially the same offense for which he was earlier tried, convicted, and sentenced to twenty years imprisonment. The court below (*Smith*, Mansfield and Bartels) agreed, and reversed the conspiracy conviction on double jeopardy grounds.

Petitioner also claimed that his trial on the two substantive counts upon which he had been convicted was barred by the Double Jeopardy and Due Process Clauses, by an agreement en-

tered into with the Government in open court in an earlier proceeding, and by requirements of fundamental fairness. The court rejected these arguments.

Background

The trial below was petitioner's sixth trial in the Southern District within a period of less than two years, based on conduct allegedly occurring between April, 1971 and February 4, 1972, a period of ten months.

The first trial (Pacelli I), presided over by Judge Milton Pollack (71 CR. 614) as was the trial below, took place in February, 1972. Petitioner was convicted of a narcotics conspiracy and on two substantive narcotics counts. The judgment and Judge Pollack's twenty-year sentence was affirmed. *United States v. Pacelli*, 470 F. 2d 67 (2d Cir. 1972), and certiorari was denied, 410 U.S. 983 (1973).

Petitioner's second trial (Pacelli II) was in June, 1972, on indictment 72 CR. 664, where he was again charged with a narcotics conspiracy and a substantive violation. The chief witness against petitioner in that case was severed co-defendant Barry Lipsky. On June 16, 1972, the following testimony was elicited from Lipsky by assistant United States Attorney Gerald Feffer:

Q. Mr. Lipsky, have any promises of any type been made to you from any governmental authority, federal, state, local, with respect to your testimony here in court today?

A. On this case, sir?

Q. Yes.

A. None whatsoever, sir. Nothing whatsoever has been promised or told to me in any way whatsoever at all.

* * *

Q. Do you expect to receive any favorable treatment in any way, shape or form from your testimony here today?

A. I have no way of knowing that, sir. I know I am indicted, on trial here for doing what is alleged I have done.

* * *

A. I do not expect to receive any favorable treatment for doing what I have done, by testifying here . . . (422-23)*

Petitioner was convicted, sentenced to fifteen years in prison, and appealed.

While the appeal of the conviction in Pacelli II was pending, petitioner was tried in December, 1972, on a third narcotics indictment (Pacelli III). Again, Lipsky was the principal Government witness. Again, Lipsky denied receiving any consideration or promises from the Government (418). This time, however, defense counsel disclosed to the court tape-recorded conversations between Assistant United States Attorney Feffer, Lipsky's attorney, and Lipsky wherein on April 11, 1972, two months before the previous trial where Feffer himself had elicited the above testimony, Feffer promised Lipsky that he would never be prosecuted for "any information that comes out of his mouth, this case or any other case" (A. 56).** Feffer agreed that Lipsky had a "contract [of] complete transactional immunity" (A. 57), and Lipsky's attorney told Lipsky he had a "verbal contract with the Government" (A. 54), and wouldn't be prosecuted for "any damn thing" (A. 55).

As a result of these disclosures, the Government requested that Pacelli II be remanded to the trial court, which request the

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* Reference is to trial transcript below.

** Reference is to petitioner's appendix in the court below.

Second Circuit granted. Ultimately, a mistrial was declared in the case then on trial, Pacelli III, and the judgment was vacated in Pacelli II.

Petitioner's fourth trial (Pacelli IV) was in May, 1973, on an indictment charging him with conspiring to deprive a federal witness of her civil rights by killing her. Again, Lipsky, the alleged co-conspirator was the principal witness against Pacelli. Convicted and sentenced to a life term consecutive to the twenty-year sentence he received in Pacelli I, petitioner appealed. On January 11, 1974, the Second Circuit reversed the civil rights conviction on the ground, *inter alia*, that the Government had failed to disclose valuable Jencks Act material. *United States v. Pacelli*, 491 F. 2d 1108 (2d Cir. 1974), *cert. den.* U.S. (No. 73-1488, February 15, 1974).

While the Pacelli IV appeal was pending, petitioner was tried twice more.

The fifth trial was in July, 1973, on 73 CR. 441, also before Judge Pollack, where petitioner was tried, along with sixteen other defendants, on essentially the same charges which made up the indictment below. After two and a half weeks of trial, Judge Pollack severed petitioner because he was needed as a witness for several co-defendants.

The sixth trial was the one below.[1]

The holding of the court below

The Second Circuit properly held that the conspiracy for which petitioner had been convicted below (Pacelli VI) was the same as that in Pacelli I (App. 5501) and that petitioner

[1] A retrial of Pacelli IV is presently scheduled for January 15, 1975.

should never have been tried on that charge. Inexplicably, however, and without expressly adverting to the matter, the court failed to reverse petitioner's convictions on the two substantive counts even though they were patently parts of the same alleged conspiracy, extensive hearsay and other prejudicial evidence was admitted under the conspiracy count without limitation, and the case against petitioner rested almost entirely on Lipsky's credibility. In fact, the evidence was so close that the jury acquitted petitioner on three counts which were supported by precisely the same evidence — Lipsky's testimony — as those upon which petitioner was convicted.

Apart from the prejudice inherent in trial and submission to the jury of the jeopardy-barred conspiracy count, petitioner made a number of arguments about the illegality of the substantive counts, each of which the court rejected:

A. *Violation of Due Process*

The two substantive counts upon which petitioner was convicted rested solely on the testimony of the Government witness, Lipsky. Count 2 alleged possession of heroin in September, 1971; Count 6 claimed possession of heroin in November, 1971. The evidence to support these charges — Lipsky's testimony — was in the Government's possession since March, 1972 (351), a year and a half before the present indictment and before petitioner's indictment on similar charges — also on Lipsky's testimony, also arising out of the same alleged conspiracy — in Pacelli II,[2] Pacelli III,[3] and Pacelli V.[4] The failure to include

[2] Pacelli II alleged that petitioner possessed cocaine for distribution in September, 1971 (A. 95).

[3] Pacelli III alleged that petitioner possessed cocaine for distribution in October, 1971 (A. 97).

[4] Pacelli V alleged that petitioner engaged in numerous acts of distributing cocaine and heroin in 1971 (A. 107).

these new charges in the Pacelli II or III indictments violated a number of well-established principles.

This was the fifth time in less than two years that the Government trotted out the same witness in an effort to convict petitioner and enhance the twenty-year sentence he is already serving. During this entire period of time, petitioner has been in prison and hasn't committed so much as a misdemeanor. He has simply asserted his constitutional rights and manifested a reluctance to forfeit his life. In the process, he embarrassed the office of the United States Attorney because he produced irrefutable proof that at least one of the Assistant United States Attorneys had knowingly elicited perjury against him, and the entire office had failed to disclose the perjury for five months after its occurrence.[5]

As a consequence, petitioner's conviction in Pacelli II was set aside and a mistrial was declared in Pacelli III. Instead of retrying those charges, however, the Government brought the present indictment. This was in violation of the principle of *North Carolina v. Pearce*, 395 U.S. 711 (1969), where the Court said:

> A defendant's exercise of a right to appeal must be free and unfettered. . . . [I]t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree

[5] As the record shows, Assistant United States Attorney Feffer wilfully and knowingly elicited and relied upon Lipsky's perjury in Pacelli II (422). Indeed, the very day he made a "verbal contract of immunity" with Lipsky, Feffer took Lipsky in the grand jury and had him testify that anything he said could be used against him and that he might be indicted on his testimony (412). Despite Feffer's statement to Lipsky and his attorney that the immunity offer was from the "Chief" (A. 49) and that he was speaking "from the head office here" (A. 50) the Government opposed defendant's motion for a new trial in Pacelli II, submitted a brief on appeal, and was prepared to argue he had a fair trial, *five months* after his conviction.

> choice . . . Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be free of apprehension of such a retaliatory motivation on the part of the sentencing judge. 395 U.S. at 725.

The *Pearce* principles apply with equal force to prosecutorial vindictiveness in the charging process. As the Second Circuit itself said in *United States ex rel Williams v. McMann*, 436 F. 2d 103 (2d Cr. 1970), *cert. den.* 402 U.S. 914:

> . . . prosecutorial vindictiveness can be no less an affront to those values we characterize as 'due process' than judicial vindictiveness. *Pearce* would have application if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct.

What happened here was, in any realistic sense, nothing more than an increase in the charges. The instant indictment, alleging six substantive offenses against petitioner, none of which had been alleged in Pacelli II or III, required petitioner to defend againt a phalanx of previously undisclosed claims, in a trial in which there were several new co-defendants, a trial infected by the fact that most of the evidence — both testimonial and tangible — dealt with persons, transactions, and times unrelated to petitioner and indeed occurring while he was in prison.

Moreover, if one compares only the substantive offenses for which petitioner was convicted below, Count 2 (possessing

heroin in September, 1971), Count 6 (possessing heroin in November, 1971), with the substantive offenses charged in Pacelli II (distributing cocaine in September, 1971 (A. 95)), and Pacelli III (distributing cocaine in October, 1971 (A. 97)), it becomes clear that the new charges in the present indictment were precluded by *Pearce*. The substitution of heroin charges was prejudicial to defendant in several respects. First, it added the likelihood of a "spillover effect" from the extensive evidence below of heroin activities by new co-defendants, and the real evidence of heroin, mix and paraphernalia introduced into evidence below. Second, it increased the possibility of conviction because of the deep community abhorrence of heroin as compared to the sentiment about non-addictive cocaine. That these considerations are not speculative is borne out by the fact that petitioner was acquitted below on all three charges involving cocaine; convicted only on two heroin counts. Had the Government retried the substantive charges in the earlier indictments, it is plain that no conviction could have been obtained.

The single substantive charge against petitioner in Pacelli II was that he and Lipsky had distributed cocaine in September, 1971 (A. 95). Yet this incident was brought out by *the defense* below (346, 1458). Conviction was precluded by the fact that Lipsky's testimony would have been refuted by that of police officers who observed Lipsky acting alone and not with petitioner, as Lipsky had testified in Pacelli II.

The single substantive charge in Pacelli III was an allegation that Lipsky and a third person distributed cocaine in October, 1971 (A. 95). The evidence supporting this allegation was introduced below, even though it was not charged. It consisted of proof that the third person had sold cocaine to an agent

(612) and Lipsky's uncorroborated claim that petitioner had told him in advance that the sale was going to occur. The jury's acquittal on all cocaine charges below establishes that they did not believe Lipsky on this point.

The relevant principle of *Pearce* and *Williams* is that when a defendant succeeds in overturning a conviction or getting a mistrial, the Government is precluded by the Due Process Clause from reindicting on related charges known to it prior to the original charges, in the absence of a justification which negates the possibility that the new charges are motivated by a desire to obtain a tactical advantage or otherwise to penalize the defendant for seeking the relief he obtained. Where, as here, the likelihood of retribution is overwhelming, such a showing should be clear and compelling. Though challenged by pre-trial (A. 78) and post-trial (A. 169) motions to supply a justification for the new charges, the Government offered none whatsoever. Neither did the court below. Instead, it merely said that the new charges were "well within the traditionally broad ambit of prosecutorial discretion." (App. 5504)

B. *Double Jeopardy*

Indictment and trial of petitioner on the heroin charges also violated the Double Jeopardy Clause, notwithstanding the technical distinctness of these offenses and those in the earlier indictments.

What Mr. Justice Brennan said in a separate opinion in *Abbate v. United States*, 350 U.S. 187 (1959) is apt:

> Obviously separate prosecutions of the same criminal conduct can be far more effectively used by a

prosecutor to harass an accused than can the imposition of consecutive sentences for various aspects of that conduct. It is always within the discretion of the trial judge whether to impose consecutive or concurrent sentences, whereas, unless the Fifth Amendment applies, it would be solely within the prosecutor's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once. Furthermore, separate prosecutions, unlike multiple punishments based on one trial, raise the possibility of an accused acquitted by one jury subsequently convicted by another for essentially the same conduct. See *Hoag v. New Jersey*, supra; cf. *Ciucci v. Illinois*, 356 U.S. 571. Thus to permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko v. Connecticut*, 302 U.S. 319, 328. Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection. This protection cannot be thwarted either by the "same evidence" test or because the conduct offends different federal statutes protecting different federal interests. The prime consideration is the protection of the accused from the harassment of successive prosecutions, and not the justification for or policy behind the statutes violated by the accused. If the same acts violate different federal statutes protecting separate federal interests those interests can be adquately protected at a single trial . . . 359 U.S. at 199.

Certainly, therefore, if jeopardy attached in any of the three prior narcotics trials where Lipsky was the chief witness, i.e., in

Pacelli II, III or V, the Double Jeopardy Clause precludes the prosecution of the substantive charges below.*

In Pacelli III, where the perjury of Lipsky in both Pacelli II and III was exposed (A. 82), petitioner consented to a mistrial after three days of negotiations, on specified conditions, which were made a part of the record (A. 83). The fair import of that agreement was that petitioner would be retried only on the same indictment or on an indictment which consolidated Pacelli II and III (A. 121). As petitioner swore below without contradiction, he understood this agreement to mean "that no new counts would be added and there would be no new indictments based upon information then available to the Government" (A. 83).

The Government did not respond to these claims, made in petitioner's pretrial motion to dismiss, apart from arguing about the meaning of the transcript (A. 140), and no hearing was held. After trial, when the agreement was relevant to sentencing, petitioner requested an evidentiary hearing concerning the understandings of the participants (A. 185). None was held. Apart from subjective understandings, however, the four corners of the agreement, read in context, make plain that petitioner's consent was conditional and that his indictment and trial in the present case was a violation of that consent. Given the fact that Lipsky had been caught committing perjury in front of the jury (A. 418-421), it is clear that had Pacelli III gone to verdict, there would have been an acquittal. Petitioner could be denied his not guilty verdict only if he expressly con-

* Count 6 of the present indictment is identical to Count 9 in Pacelli V. Counts 2 and 6 relate to events in September and November, 1971 while the substantive count in Pacelli II related to September, 1971, and that in Pacelli III related to October, 1971. The time frames were therefore virtually identical.

sented. He would not have consented had the Government intimated, or had he or his attorney considered it possible, that the Government would bring up new charges, try him with new defendants, and accuse him of conspiring with all manner of persons he had no association with or knowledge of — all based on Barry Lipsky. Petitioner's indictment and trial in the present case (as well as Pacelli V, which was mistried) was therefore a blatant violation of the conditions of petitioner's consent, rendering it nugatory. Since the Government intended to bring new charges at the time it obtained petitioner's consent to a mistrial in Pacelli III, it got his consent by fraud. The consent was therefore a nullity and petitioner's jeopardy in Pacelli III bars prosecution of the charges below.

Furthermore, petitioner was induced to move to set aside his conviction in Pacelli II by the foregoing agreement coupled with affirmative Governmental misrepresentation. Subsequent to the mistrial in Pacelli III, the government asked the court below to remand Pacelli II. Then, in March, 1973, petitioner moved to set aside the conviction (A. 129), plainly predicated upon the Government's representation, made in Pacelli III, that if Pacelli II were vacated, the Government would have "the option of including in that retrial [Pacelli III]. In other words, those two indictments [Pacelli II and III] would either be consolidated or a superseding indictment encompassing the crimes charged in both indictments would be filed and that case would be tried as one" (A. 124). This agreement was not kept. Moreover, in the *very proceeding* in which the defendant moved to set aside the conviction in Pacelli II, the court was told by the Government that "the government intends to prosecute the same indictment" (A. 135). Instead, petitioner was charged less than six weeks later, in Pacelli V, on an indictment wholly different in

scope, parties, number of charges, length and complexity of trial, and procedural disadvantage (A. 84).

The solemn agreements the Government made are plainly enforceable. If not, the defendant's waivers of jeopardy in Pacelli II and III are nullities. *Cf. Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Graham*, 325 F. 2d 922 (6th Cir. 1963).

C. *Elementary Fairness and Speedy Prosecution*

Apart from *Pearce*, apart from double jeopardy, the substantive charges are barred by elementary fairness and efficient judicial administration. The Government had the evidence on the substantive charges since March, 1972. It indicted and tried defendant three times since then before charging him with Count 6 in April, 1973 (Pacelli V). It indicted and tried him four times before charging him with Count 2, in the present indictment, brought in September, 1973, a year and a half after Lipsky gave the Government its evidence. In the absence of strong justification (*e.g.*, the absence of evidence), failure to make charges which could be joined in an indictment bars subsequent prosecution. See A.L.I. Model Penal Code §1.08(2), 1.10; A.B.A. Standards Relating to Joinder and Severance (Approved Draft, 1968) §1.3(c). See also, *Petite v. United States*, 361 U.S. 529 (1960) (conviction vacated "in the interest of justice" pursuant to 28 U.S.C. §2106, on motion of the Solicitor General which stated that it was the general policy of the Government "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement); *Marakar v. United States*, 370 U.S. 723 (1962).

The failure to include these charges in the earlier indictments not only precludes prosecution because of considerations of efficient judicial administration and fairness to the defendant, it denies him speedy prosecution. As was so aptly said in *Sanchez v. United States*, 341 F. 2d 225 (9th Cir. 1965):

> exposure of an accused to a succession of trials . . . for the deliberate purpose of enhancing the chance of conviction on weak evidence might well constitute fundamental unfairness . . . and delays for such purpose might well be unreasonable under both the Sixth Amendment and Rule 48(b), *no matter how short in duration.*

Assuming arguendo that jeopardy was fully, completely and unconditionally waived in each of the prior trials, it is still grossly unfair to have conjured up the new accusations. The charges of heroin distribution were stale. Lipsky claimed to have observed and participated in these events with petitioner more than three years prior to trial. He was unable or unwilling even to pin down the month in which they occurred (87, 118, 124, 362).[7] It was therefore impossible for defendant to counter Lipsky's claims with an alibi or with witnesses having different recollections of events in the summer and fall of 1971. The delay in prosecuting defendant on these charges was therefore prejudicial and entirely unwarranted by any considerations of investigative or prosecutorial efficiency. *Cf. Ross v. United States*, 349 F. 2d 210 (D.C. Cir. 1965); *United States v. Sanchez*, 361 F. 2d 824 (2d Cir. 1966). It is improper for the prosecution to delay "to gain some tactical advantage over [defendants] or to harass them." *United States v. Marion*, 404 U.S. 307, 325 (1971). See also, *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

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[7] The bill of particulars refused to confine most of the transactions even to a specific month (A. 7).

That is clearly what happened in this case. No semblance of justification for the delay has ever been offered by the Government and none could be suggested by the court below. Instead, overlooking the fact that the jury acquitted petitioner on three counts, the court below rejected petitioner's arguments because he had not sufficiently demonstrated that the delay was prejudicial or due to bad faith on the part of the Government. Rather, the evidence against petitioner was said to be "too weighty" (App. 5506) and too "well founded" (App. 5507) to permit such an inference.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit raises both important problems and conflict of decisions with respect to several matters of concern to this Court:

A. Under Question 1

1. The application of the Double Jeopardy Clause to substantive charges, closely related to though technically distinct from similar charges made in earlier indictments, where the new charges appear to have been added to gain tactical advantages and to wear down the defendant as a penalty for successfully attacking the earlier conviction and obtaining a mistrial on the original charges.

2. The application of *North Carolina v. Pearce*, 395 U.S. 711 (1969) to the unjustified addition of new but related charges, following successful attack on a conviction and a mistrial, both having been predicated upon clear proof of criminal misconduct by the prosecuting attorney.

3. The effectiveness and validity of presumptive waivers of

former jeopardy (in Pacelli II and III) where they were obtained by an agreement that clearly contemplated retrial only of the charges present in the case mistried (Pacelli III) and the vacated conviction (Pacelli II); such agreement was obtained by prosecutorial perfidy and then breached.

4. The meaning and application of the rule of *United States v. Marion*, 404 U.S. 307, 325 (1971), that it is improper to delay charges "to gain some tactical advantage over [defendants] or to harass them."

5. The effect on fair and orderly administration of criminal justice in the federal courts of a prosecutorial decision to add new and additional charges against a defendant when those charges were available for earlier indictments, the defendant succeeded in vacating a conviction and obtaining a mistrial by proving blatant prosecutorial violation of his constitutional rights, and the added charges, though based on the same witness's testimony, were more difficult to refute than the charges originally brought.

B. Under Question 2

1. Whether simultaneously trying and submitting to the jury a jeopardy-barred conspiracy count and related substantive counts is a violation of the Double Jeopardy Clause with respect to *all* charges tried and submitted.

2. Whether, in a prosecution resting almost entirely on the testimony of one witness, it is harmless error to join for trial a jeopardy-barred conspiracy count with related substantive counts, where (1) extensive hearsay and other evidence admissible only as in furtherance of a conspiracy is admitted and considered by the jury without limitation; (2) the jury disbe-

lieved the witness and acquitted on three counts indistinguishable from the two counts upon which it convicted, except that the narcotic substance allegedly involved was different.

With respect to the issues presented in Question 1, their importance and the errors of the court below appear in the discussion of the court's holding (*supra*, pp. 6-17). It need only be added that another precious principle of due process is pervasively threatened by the decision below: that justice must both be and appear to be fair. See *Offutt v. United States*, 348 U.S. 11, 14 (1954). What leaps from this record is that in its repeated efforts to destroy petitioner the Government has been shockingly unfair. It knowingly elicited perjurious testimony against petitioner in Pacelli II and III, then sought to minimize the impact of its own misconduct by a perfidious agreement concerning re-trial of those charges, then added six new charges it had secretly been hiding for a year and a half. Knowing it could not convict petitioner on the charges in Pacelli II or III (knowledge it acquired by putting petitioner through two unfair trials), it pulled out some new accusations, for a fresh, surprising and prejudicial sixth round. Though challenged at every level to offer any other explanation, the Government could not do so. In permitting this abuse of prosecutorial power, the court below has licensed its repetition. A basic concern for efficient use of prosecutorial and judicial resources, apart from considerations of fairness, should lead this Court to revoke the license.

With respect to Question 2, which the court below didn't even explicitly consider, the error in affirming the substantive convictions is plainly in conflict with *Price v. Georgia*, 398 U.S. 323 (1969). There, the Court unanimously held that the Double Jeopardy Clause prohibits not merely additional punishment

for an offense for which an accused had already been in jeopardy, but "the risk or hazard of trial and conviction" as well. *Id.* at 331. Accordingly, it was error of constitutional dimensions to retry and submit to the jury a jeopardy-barred offense (first degree murder) even though the jury convicted only on another offense (voluntary manslaughter) which was not barred. Since it was impossible to conclude beyond reasonable doubt that the presence of the barred charge made no contribution to the jury's verdict, the error was not harmless and reversal was required. See also, *United States ex rel Hetenyi v. Wilkins,* 348 F. 2d 844 (2d Cir. 1965), where the Second Circuit, in an opinion by then Circuit Judge Marshall, reached a similar conclusion:

> there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that Hetenyi was indicted, prosecuted and charged with first degree murder and . . . the State was constitutionally forbidden to [do so]. Both the existence of this possibility of prejudice and the fact that it arises from a violation of the accused's constitutional rights [requires reversal of a conviction for second degree murder]. 348 F. 2d at 864.

Reversal of the convictions on the substantive counts in this case follows *a fortiori* from *Price* and *Hetenyi.* Trial of the accused on a jeopardy-barred offense in those cases did not produce otherwise impermissible joinder of defendants, as it did here, nor did it affect the admissibility of evidence. Its only possible impact was on the jury's deliberations. Here, on the contrary, trial of petitioner on the barred conspiracy charge directly produced his joinder with four alleged co-conspirators, admission of damaging hearsay statements by alleged co-conspirators, and great quantities of narcotics and paraphernalia connected to

petitioner only by the conspiracy theory. Thus, retrying petitioner on the conspiracy charge not only poisoned the jury deliberations, it infected every aspect of the trial. To try petitioner on the substantive counts under such conditions is to make the prohibition against double jeopardy meaningless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

STEVEN B. DUKE
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New Haven, Conn. 06520
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1141, 1103, 1165, 1176—September Term, 1973.

(Argued June 21, 1974 Decided September 23, 1974.)

Docket Nos. 74-1327, 74-1339, 74-1328, 74-1499

UNITED STATES OF AMERICA,

Appellee,

v.

BENJAMIN MALLAH, VINCENT PACELLI, JR., ALFRED CATINO and BARNEY BARRETT,

Appellants.

Before:

SMITH and MANSFIELD, *Circuit Judges,* and BARTELS,* *District Judge.*

Appeal by Benjamin Mallah, Vincent Pacelli, Jr., Alfred Catino and Barney Barrett from conviction of narcotics violations on trial to the jury in the United States District Court for the Southern District of New York, Milton Pollack, *Judge.*

Conviction of appellant Pacelli on conspiracy count reversed, otherwise affirmed as to all other counts and all appellants.

* Senior United States District Judge for the Eastern District of New York, sitting by designation.

GERALD L. SHARGEL (La Rossa, Shargel & Fischetti, New York, N.Y., James M. La Rossa, of counsel), *for Appellant Mallah.*

NANCY ROSNER (Rosner, Fisher & Scribner, New York, N.Y., Alan Scribner, of counsel), *for Appellant Catino.*

STEVEN B. DUKE, New Haven, Conn., *for Appellant Pacelli.*

JAMES P. LAVIN, Asst. U.S. Attorney (Paul J. Curran, U.S. Attorney for the Southern District of New York, Lawrence S. Feld, Asst. U.S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

Benjamin Mallah, Vincent Pacelli, Jr., Alfred Catino and Barney Barrett appeal from judgments of conviction entered on February 26, 1974 and March 15, 1974, after a jury trial in the Southern District of New York, Milton Pollack, *Judge.* The jury found all four appellants guilty of conspiring to violate the federal narcotics laws and also found Pacelli guilty of two substantive narcotics offenses and Catino guilty of one such offense. We affirm in part and reverse in part.

The four appellants were charged with participating together with forty-two other named co-conspirators in a conspiracy to distribute large amounts of heroin and cocaine in New York. Pacelli, Catino and Mallah were also charged with substantive offenses. Eleven members of this conspiracy were tried and convicted on July 12, 1973 (the *Sperling* trial), and these convictions are presently on appeal to this court. Five of the named co-conspirators were tried below. Appellant Pacelli was originally a defendant

in the *Sperling* trial, but he was granted a severance at the end of the government's case there. Appellant Mallah was apprehended subsequent to the *Sperling* trial. Catino, Barrett and Alfred DeFranco were added as defendants in the superseding indictment.

The evidence at this trial established that appellant Pacelli and co-conspirator Herbert Sperling were the central figures within a large organization engaged in distributing heroin and cocaine in New York and that appellant Mallah acted as banker to the operation. The proof against appellants Catino and Barrett showed them to be lesser figures in the organization. The jury found Pacelli innocent of three substantive counts and completely exonerated DeFranco, who had been charged with one count of conspiracy and one substantive count.

Appellants raise numerous points on appeal, one of which requires the reversal of one count of the convictions below.

A. Mallah

Appellant Mallah contends that there was insufficient evidence, independent of hearsay statements by co-conspirators, to tie him to the criminal venture. The thrust of Mallah's defense was that he did associate with the conspirators, but only in his capacity as their bookmaker. Thus, he explains the evidence of the passage of large sums of money to and from him and the conspirators (chiefly Sperling) as incident to gambling activity rather than to drug dealings. Citing *United States* v. *Di Re*, 159 F.2d 818 (2d Cir. 1947), *aff'd*, 332 U.S. 581 (1948), he concludes that the government failed to show more than mere association with criminals.

This argument cannot withstand the weight of the independent evidence. Cecile Mileto, wife of co-conspirator

Louis Mileto, testified that she saw packages containing white powder piled on a table in Sperling's apartment, in Mallah's presence, and that Mallah asked Sperling, "Are you going to have enough money for this?" On another occasion, a police officer concealed in the trunk of a Cadillac El Dorado parked in front of the organization's barbershop front overheard the following conversation between Sperling and Mallah, who had just emerged from the shop:

> Sperling: "I got to have the stuff."
> Mallah: "Don't worry about it."
> Sperling: "Fifty thou, right."
> Mallah: "Yes, right, fifty-fifty."
> Sperling: "But I got to have it. You know I need it."
> Mallah: "Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it."
> Sperling: "But I need it."
> Mallah: "Don't worry about it. If the people were straight, if they are not on the run we should have it."

On a third occasion, Mallah was seen leaving Sperling's apartment carrying a shoe box wrapped in distinctive paper minutes after co-conspirators Mileto and Joseph Conforti had delivered that box, containing proceeds from a narcotics transaction, to Sperling. There also was evidence that Mallah fled when he heard that some members of the conspiracy had been arrested.

Taken together, these pieces of evidence constitute a sufficient showing that Mallah associated himself with the criminal venture charged. *United States* v. *Calabro*, 449 F.2d 885, 889-91 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

Mallah's second point on appeal is that the evidence adduced below established two, distinct conspiracies, if any: one, led by Sperling, dealing in heroin; the second, led by Pacelli, dealing in cocaine. But while the evidence did indicate that the co-conspirators often moved in two groups, there was sufficient indicia of criminal partnership —including common direction from the core conspirators, commingling of assets, mutual dependence, and common business offices—to link the two groups together. As in a firm with a real estate department and an insurance department, the fact that partners bring in two kinds of business on the basis of their different skills and connections does not affect the fact that they are partners in a more general business venture. Each of the defendants must have been aware that he was participating in a scheme in which there were many suppliers and purchasers of both heroin and cocaine. The jury was entitled to find that the defendants belonged to the same firm. *United States* v. *Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds*, —— U.S. ——, 42 U.S. L.W. 3646 (May 28, 1974); *United States* v. *Arroyo*, —— F.2d ——, slip opinion 2309 (2d Cir. March 22, 1974).

Appellant next contends that he was improperly limited in attempting to contradict the testimony of Joseph Conforti, an accomplice witness. Conforti admitted on direct examination that he had called Sam Kaplan, a defendant in the *Sperling* trial, on the orders of co-conspirator/fugitive Jack Spada, to tell Kaplan that Kaplan should pay Spada $10,000 or else Conforti would testify about a narcotics transaction involving Kaplan.[1] Conforti testified that Kaplan told him that he, Kaplan, had no money, and that Conforti relayed this to Spada who told Conforti not to worry about it. Thus, Conforti admitted

1 In fact, Conforti did not so testify, and Kaplan was acquitted.

to participating in a scheme to extort money from a defendant in a criminal trial by threatening him with prejudicial testimony.

Appellant wanted more. He wanted to introduce a tape recording of the Conforti-Kaplan conversation and also extrinsic evidence to the effect that Spada had died[2] prior to the Conforti-Kaplan conversation. With this, appellant hoped to prove that Conforti acted on his own in this extortion plan and not as Spada's agent. Judge Pollack refused to allow this evidence to be introduced, ruling that it was collateral.

The court did not err in excluding this evidence. Although extrinsic evidence is admissible to show a special motive to lie or fabricate a case against a defendant, *United States* v. *Kinnard*, 465 F.2d 566 (D.C. Cir. 1972); *United States* v. *Haggett*, 438 F.2d 396 (2d Cir.), *cert. denied*, 402 U.S. 946 (1971), the evidence in dispute here is not probative in that respect. The extortion scheme was directed against Sam Kaplan, not against any of the defendants in this case. Thus, this disputed evidence is more fairly seen as inadmissible, extrinsic proof of Conforti's bad character. *United States* v. *Glasser*, 443 F.2d 994, 1002-03 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *DeSapio*, 456 F.2d 644, 648, n. 1 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). Moreover, Conforti's admission to participating in the extortion plot shed a good deal of light on his credibility. The disputed evidence would have added little additional candle power but, considering the confused and obscene character of the taped conversation and the fact that the evidence concerning the date of Spada's death would have been protracted, might well have distracted the jury.

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2 Spada was found riddled with bullets and with both hands hacked off at the wrists.

Appellant complains of a second instance in which the court limited his right to impeach a government witness, the cross-examination of Barry Lipsky. Lipsky was a key government witness, an accomplice witness who had been Pacelli's right-hand man. On direct examination, Lipsky testified to the criminal involvement of each of the appellants and admitted to his own involvement in criminal activity. On cross-examination, the court refused to permit appellant to question Lipsky concerning the details of one of his crimes, the murder of Patsy Parks.

In February, 1972, a few days before the scheduled trial of an indictment against appellant Pacelli on a different narcotics charge, federal agents attempted to serve a subpoena on Parks, who had testified before the grand jury which issued the indictment. Upon learning that the agents sought her, Parks went to the Hippopotamus Discotheque in New York where she told Lipsky that she urgently wanted to see Pacelli about the subpoena. Lipsky immediately taxied to New Rochelle to inform Pacelli about this development, and there the two men decided that the proper course of action was to kill Parks. They drove back to Manhattan, stopping on the way to purchase four one-gallon cans of gasoline. Pacelli and Lipsky then took the prospective government witness for her last ride. According to Lipsky's testimony at Pacelli's trial for the killing, Lipsky replaced Pacelli at the wheel and Pacelli stabbed her repeatedly in the throat, saying "Die, you bitch." Lipsky then drove to a wooded area where they poured the gasoline over the body and set it on fire.

Lipsky was indicted for murder in Nassau County and confessed to the crime. He wrote to federal authorities, suggesting an exchange of narcotics information for federal assistance on the state charge. Before the negotiations began, the state apparently refused to consider allowing

Lipsky to plead to a lesser charge than first degree murder; after intervention by the federal government, Lipsky was permitted to plead guilty to manslaughter in the first degree and received an indeterminate sentence of twenty years in prison for which parole was immediately available.[3]

At the trial below, appellant sought to cross-examine Lipsky about the details of the Parks murder. The court, however, restricted the examination only to the fact of the indictment, plea and sentence, and the aid given by the federal government in obtaining the plea. Appellant now contends that this restriction deprived him of a fair trial in that (1) the jury could not appreciate the extent of the government's consideration to Lipsky nor the extent of his motive to testify for the government unless they understood that the crime was a premeditated and brutal murder of a government witness rather than one which involved even the slightest of extenuating circumstances, and (2) the details of the crime bear on Lipsky's sanity, a factor which is relevant to his credibility.

While the details of the murder are relevant both to Lipsky's motivation and to his mental competence, the introduction of this evidence might well have confused the jury and might also have prejudiced the case against appellant Pacelli, whose involvement in the murder could have been revealed in the telling. Moreover the jury did have before it sufficient evidence concerning Lipsky's credibility to make a discriminating appraisal of him.

During both direct and cross-examination, Lipsky admitted to testifying falsely before a Florida grand jury in 1970, lying to a probation officer in Florida, having been

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[3] Appellant Pacelli was convicted in the Southern District of New York of conspiring with Lipsky to deprive Parks of her civil rights by killing her. Lipsky testified against Pacelli. This conviction was reversed in *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974).

convicted in Miami of conspiring to transport stolen securities in interstate commerce, lying to the sentencing judge, testifying falsely as to promises made to him in two trials involving appellant Pacelli in the Southern District of New York in 1972, having used as well as distributed cocaine, receiving promises that he would not be prosecuted for his narcotics activities, and to his expectations that he would not be prosecuted for past acts of perjury or tax evasion or for defrauding a person of $20,000 in Miami in 1970. Lipsky also conceded that on occasion he beat his head against walls, that he had once fired a gun at a television set when its vertical hold needed adjustment, that he had thrown a scale into the ocean when it did not show that he was losing weight, and that he frequently placed random calls in the name of a Mr. Graves, who was an announcer on his favorite horror television show in Miami.

The jury clearly understood the import of this evidence. Co-defendant DeFranco was implicated in the narcotics dealings by Lipsky in the same way that appellant Catino was implicated. Indeed, Lipsky testified that in one of the several transactions involving DeFranco, DeFranco personally gave Lipsky the keys to the car in which Lipsky was to place the drugs and Lipsky personally returned the keys of the then drug-laden car to DeFranco. Yet, despite Lipsky's clearly inculpatory testimony against DeFranco, the jury acquitted DeFranco after sending a note to the court asking, "Please let us know if anyone other than Lipsky testified against DeFranco. If there is other testimony, may we have it?" and on receiving the answer that Lipsky was the only witness against DeFranco. Pacelli, too, was acquitted on substantive counts where Lipsky was not corroborated.

The jury had before it evidence which called Lipsky's credibility into serious question. Defense counsel stressed

this evidence in summation, and the judge instructed the jury that Lipsky's testimony was "inherently suspect." The dispositions indicate that the jury was wary of Lipsky's account. In light of these factors, the restriction appears to have been neither prejudicial nor erroneous.

Appellant's fifth argument concerns the prosecutor's summation. Lipsky had testified on direct examination to a sale in Yellowfingers Restaurant involving Pacelli. On cross-examination, Lipsky admitted that he had testified at the *Sperling* trial to a second sale in Yellowfingers involving Pacelli and co-conspirator Luis Valentine, who was convicted in the *Sperling* trial. Defense counsel then introduced testimony given in the *Sperling* trial by a police officer, since deceased, in which the officer stated that he surveilled Yellowfingers on the day the second sale supposedly occurred and that while he observed Lipsky, Valentine and several other people there that day he did not see Pacelli. In summation, Mr. Duke, Pacelli's counsel, argued that the reason why Lipsky had not testified in this trial about that second sale in Yellowfingers was that if he had so testified the testimony of the officer would have proved him a liar, as it had in the first trial. The prosecutor responded:

> I recall Mr. Duke told you on one occasion that he read some testimony yesterday into the record that was about a surveillance of a Valentine buy at the Yellowfingers Cafe, and he read the whole thing, and he said his conclusion was that Mr. Lipsky did not testify about that at this trial because he had found out that he was under surveillance.
>
> Well, the reason that he didn't testify about it at that trial was that those persons were already convicted, as Mr. Duke well knew, and there was no reason to testify.

Appellant contends that this remark deprived him of a fair trial: it advised the jury that other persons involved in the conspiracy charged had been convicted of such involvement. Appellant Pacelli makes the further point that the prosecutor's remark suggested to the jury that Pacelli himself had been convicted of participation in the conspiracy because Mr. Duke was Pacelli's counsel.

The government concedes that the remark was improper, as indeed it was. The prosecutor could have responded to Mr. Duke's argument by noting that there was no need for Lipsky to testify concerning the second sale because most of those who participated in that sale were not on trial here. To the extent that this represents an incomplete answer, the government should have remained silent. Mr. Duke's point was well taken. Neither can the remark be justified as an instance of fighting fire with fire. *United States* v. *LaSorsa*, 480 F.2d 522, 525-26 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973). Although Mr. Duke's summation was in good part accusatory,[4] the suggestion of previous convictions reflected on the other defendants as well, and their summations were not so vitriolic. The government would do well to avoid such a suggestion in the future. *See, United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States* v. *Miller*, 478 F.2d 1315 (2d Cir. 1973); *United States* v. *Fernandez*, 480 F.2d 726, 741 (2d Cir. 1973); *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973).

The court recognized the error and immediately cautioned the jury:

> Ladies and Gentlemen, it is my duty again, despite the fact that I have said this before, you are admon-

4 In his summation, Mr. Duke stated that Lipsky and an Assistant United States Attorney were "a couple of crooks" and that the only conspiracy proven at the trial was one between Lipsky and that Assistant to obstruct justice and commit perjury.

ished, you are instructed, you are implored, using any word that I can indicate to you, to erase from your minds any of the argument of counsel on either side, and particularly that last comment which has nothing and no support in the evidence. It is the evidence in this case which governs, and nothing which has run outside of the evidence and there have been indications on both sides now of a comment which should not have been made that doesn't relate to the evidence.

Let's get on with the evidence Mr. Lavin, and your comments about the evidence, and not things that are not in evidence. Let's not have it happen again.

Moreover, the context of this remark cushioned its impact. Appellants' defenses were not that no conspiracy existed but that they were not part of it. If a conspiracy in fact existed, someone must be guilty of it. If others had already been found guilty, perhaps these defendants were innocent. This reasoning is, of course, speculative. But it is no less speculative to argue that the error deprived appellants of a fair trial. The error here was isolated, its prejudicial effect dependent upon a chain of reasoning which was not obvious, the court immediately cautioned the jury, and the evidence against each of the appellants was considerable. Moreover, the jury acquitted a co-defendant on all counts. While remarks in the prosecution's summation concerning convictions in related cases deserve special scrutiny, we conclude that this remark did not deprive appellants of a fair trial.

Appellant's remaining contentions deserve less attention. He argues that *Ashe* v. *Swenson*, 397 U.S. 436 (1970), requires that his conviction on the conspiracy count be reversed because it is inconsistent with the dismissal below of the substantive count at the close of the govern-

ment's case. Since under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), Mallah is liable substantively for offenses committed in furtherance of the conspiracy of which he is proven to have been a part, dismissal of the substantive count does appear to be inconsistent with a judgment of conviction on the conspiracy count. However, this inconsistency does not deprive appellant of his rights. Mallah cannot rely on *Ashe*, as Mallah was not exposed to jeopardy twice: Judge Pollack could only acquit, he could not convict. "[T]he principle that bars relitigation between the same parties of issues actually determined at a previous trial," *Ashe*, 397 U.S. at 442, is simply not applicable where there has been no previous trial. The inconsistency could not have prejudiced appellant, and it may well have benefited him.

Appellant argues that it was error to introduce evidence of a heroin transaction which occurred on February 10, 1972 between co-conspirator Paul Carter and narcotics agent Pope. Pope testified that Carter obtained the heroin from co-conspirator Mark Reiter, who in turn got it from Louis Mileto. Appellant argues that since the evidence showed that Sperling disapproved of this transaction, apparently because he was feuding with Reiter, the transaction was not "in furtherance of the conspiracy." But the only thing which distinguished this transaction from the many others made "in furtherance of the conspiracy" was that Mileto received less than his customary "take" because he disobeyed Sperling's instructions. There was no evidence that Sperling attempted to rescind the sale. The jury could reasonably have found that the transaction was in furtherance of the conspiracy charged.

Finally, Mallah relies on *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973), for the proposition that the admission of testimony by accomplice witnesses Lipsky and Conforti to the effect

that other members of the conspiracy (Pacelli and Mileto, respectively) told them that Mallah was a partner in the conspiracy violated his right to confrontation. But where the declarant and the listener witness know each other to be members of the conspiracy at the time the statement is made, there is no reason to doubt the veracity of the testimony, and *Puco* does not bar its introduction into evidence.

B. Catino

Appellant Catino joins in several of the arguments discussed above. We reject these claims for the reasons noted. Catino also objects to the introduction of certain evidence.

When appellant was arrested outside his home on September 26, 1973, six days after the indictment in this case was handed up, he was carrying a paper bag which contained eight thermometers. These thermometers were introduced into evidence, the government arguing that they were narcotics paraphernalia. The defense established that the thermometers seized had a maximum reading of 148 degrees centigrade, and that heroin "breaks" at 240 degrees centigrade if pure and at below 190 degrees if cut. Thus the defense argued that these thermometers were not useful in the narcotics trade, and its expert witness testified as to their other possible uses. The government argued in summation that Catino had mistakenly purchased the wrong type of thermometer (Fahrenheit rather than centigrade). Catino now contends that the thermometers should not have been introduced, on the theory that they were relevant only to his criminal character or disposition. *United States* v. *Smith*, 283 F.2d 760, 763 (2d Cir. 1960), *cert. denied*, 365 U.S. 851 (1961); *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970).

Clearly, appellant's possession of the eight thermometers is relevant to his state of mind, his intent, in respect to

the conspiracy. *United States* v. *Cohen*, 489 F.2d 945 (2d Cir. 1973); *United States* v. *Nathan*, 476 F.2d 456, 459-60 (2d Cir. 1973); *United States* v. *Del Purgatorio*, 411 F.2d 84, 86-87 (2d Cir. 1969). The thrust of appellant's comments at oral argument was that the possession was too remote to be admissible on this theory. But we cannot say that activity which takes place six days after the conspiracy ended is so remote that evidence of that activity must be excluded. To the extent that appellant's argument focuses on the fact that the thermometers were Fahrenheit rather than centigrade, this was a matter for the jury. Appellant forcefully argued the point to the jury, and the government conceded much of the argument. But the jury could reasonably have found, as they appear to have found, that Catino did err in buying the thermometers or that the thermometers were useful to the conspirators as a minimal check for quality control.

Catino's final point is that Lipsky should not have been permitted to testify against him because Lipsky was an incompetent witness. He contends that because Lipsky admitted to lying at three other criminal trials and having not been and not expecting to be prosecuted for that perjury, Lipsky had no respect for the oath and was therefore incompetent to testify. But it does not follow from this previous experience that Lipsky's testimony below was untrue. Moreover, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). Lipsky was subject to intense cross-examination in which his prior perjury and his present expectations of immunity were exposed. The trial judge told the jury that Lipsky's testimony was "inherently suspect." As noted, these safeguards appear to have had the intended effect.

C. Barrett

Appellant Barrett raises no issues which have not been dealt with above.

D. Pacelli

Appellant Pacelli does not rely on the customary challenges to evidentiary rulings and factual findings. His appendix is replete with excerpts not from the trial transcript, but from correspondence with the United States Attorney, taped conversations between counsel and the United States Attorney, copies of previous indictments against Pacelli and transcripts of various hearings in related cases; it is, he complains, bursting with the poison of prosecutorial vindictiveness. And, indeed, Pacelli and the U.S. Attorney's Office of the Southern District of New York have a history of chronic conflict.

In February, 1972, Pacelli was convicted in federal court, Southern District of New York, of participating in a conspiracy to violate the narcotics laws and of two substantive narcotics violations. The conviction was affirmed; *United States* v. *Pacelli*, 470 F.2d 67 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973). Lipsky did not testify at this trial, which we will call *Pacelli I*.

In June, 1972, Pacelli was convicted in the Southern District of New York of participating in another narcotics conspiracy and of substantive counts. At this trial, *Pacelli II*, Lipsky testified against Pacelli and stated that the government had made him no promises in exchange for his testimony.

In December, 1972, while the appeal in *Pacelli II* was pending, Pacelli was tried on new, substantive narcotics charges. Again, Lipsky testified and denied having been promised anything by the government. This time, however, defense counsel disclosed to the court a tape recording of

a conversation between Lipsky, Lipsky's counsel and an Assistant United States Attorney in which Lipsky was promised on April 11, 1972, that he would not be prosecuted for "any information that comes out of his mouth, this case or any other case." As a result of this disclosure, *Pacelli II* was remanded to the district court, where that judgment was vacated, and a mistrial was declared in the December, 1972 case, *Pacelli III*.

In May, 1973, Pacelli was convicted in the Southern District of New York of conspiring to deprive Patsy Parks of her civil rights by killing her. Lipsky testified against Pacelli, this time informing the jury of the government's promise. This court reversed this conviction primarily on the ground that the government had failed to disclose valuable Jencks Act material to Pacelli. *United States* v. *Pacelli*, 491 F.2d 1108 (1974). This was *Pacelli IV*.

In July, 1973, Pacelli went to trial in the *Sperling* case. After two weeks of trial, he was severed because he was needed as a witness for several co-defendants.

The trial below is thus *Pacelli VI*. Pacelli was first arrested in February, 1972. He is presently in federal prison where he is serving a twenty-year sentence based on his conviction in *Pacelli I*. He challenges his conviction below on the conspiracy count and on the two substantive counts, largely on the basis of this prior history.

The Conspiracy Count

Pacelli contends that he has been convicted twice of the same offense, in that his conviction below on the conspiracy count and his conviction of conspiracy in *Pacelli I* are identical.

In *Pacelli I*, Pacelli was charged with conspiring with Demetrios Papadakos, a/k/a James Pappas, Beverly Jalaba, Elisa Possas and "others to the Grand Jury unknown"

to violate the federal narcotics laws from January 1, 1971 to June 14, 1971. The overt acts were alleged to have taken place in New York City in May, 1971. The proof indicated that Papadakos, Pappas and Jalaba were underlings in the scheme, but did not suggest anything about the scope of the venture beyond the transactions specified as overt acts. Below, Pacelli was charged with conspiring with Mallah, Catino, Barrett, DeFranco, Ismael Torres, Peter Salanardi, Courtland Sample, a/k/a "Bucky," Albert Perez, a/k/a "Abbe," Al Bracer, Edgardo Ramirez, Jack Spada, John Fazzalardi, a/k/a "Fuzzy," Herbert Sperling, Joseph Conforti, Louis Mileto, Barry Lipsky, and "others to the Grand Jury known and unknown," to violate the federal narcotics laws from January 1, 1971 to September 23, 1973. The overt acts were alleged to have taken place in New York City between July, 1971 and January, 1973. The proof established a large-scale conspiracy to distribute heroin and cocaine in the New York area, with Pacelli near the core of the organization and a large staff beneath him. In the bill of particulars below, the government named twenty-nine further unindicted co-conspirators.[5]

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5 They were:

Norman Goldstein, a/k/a "Sonny Gold"
Jack Bless
Edward Bless
Nicholas Cuccinello, a/k/a "Lucky Red"
Cecile Sperling
Juan Serrano, a/k/a "John Negron"
Frank Bassi, Jr.
Antoinette Bassi
Fred Berger
Frank Serrano
Luis Valentine, a/k/a Ramon Lombardero
Reginald Williams
Octavio Del Busto
Nelson Garcia
Susan Ueyl
Salvatore Ruggiero
Edward Peter Schworak

The government contends that because there were no named co-conspirators common to the two indictments, because different overt acts were alleged in each indictment, because the conspiracy below continued into 1973 whereas the conspiracy in *Pacelli I* ended in May, 1971, and because there is a suggestion in *Pacelli I* that that conspiracy extended to distributing narcotics to customers in the Midwest whereas the proof below established activity only in New York, the two conspiracies are distinct.

This reasoning is undercut by several factors. First, the *Pacelli I* indictment specified that Pacelli, Papadakos, Possas and Jalaba conspired with "others unknown to the Grand Jury." Therefore, the non-identity of the named conspirators does not establish that there was no overlap in personnel other than Pacelli. Second, the proof below established that Pacelli was at or near the center of a large-scale, far-flung narcotics organization and therefore suggests the possibility that the others "unknown to the Grand Jury" involved in *Pacelli I* were members of the conspiracy proven below. Again, it is quite possible that prosecutorial discretion alone explains the distinctness of the overt acts alleged. As the prosecutor argued in part in summation, there was no need to prove acts relating to other conspirators not on trial below. Thus, the overt acts specified in the indictment in *Pacelli V* (the *Sperling* trial)

John Ramos
Carlo Lombardi
John Capra, a/k/a "Hooks"
Stephen Delacava, a/k/a "Beansie"
Leo Guarino
Carlo Lombardi
Nicholas Lugo
Peter Aponte
Albert Gonzalez
Paul Carter
Mark Reiter
John Caruso

are not identical to those specified in the indictment below although the government concedes that they are the same conspiracy.[6] Neither are the dates of the two conspiracies truly distinct. Both were alleged to have commenced in January, 1971 and to have operated through May, 1971. The fact that both conspiracies were *alleged* to have operated in New York City, indeed that the overt acts were alleged to have taken place only a matter of a few miles from each other, strengthens the suggestion that the two conspiracies are really one. While New York City is large enough to harbor two simultaneous narcotics conspiracies, one of the two charged here is of a scale such that it is likely to have been known to those in the business in New York, and the participation of a core conspirator in that large operation in a series of narcotics transactions raises an inference that it is that large operation that is at work.

In short, it is very possible that Papadakos, Pappas and Jalaba recognized that they were part of the Pacelli/Sperling organization rather than having an independent existence and identity of their own.

Indeed, had Papadakos, Possas and Jalaba been tried together with Pacelli, Mallah, Catino, Barrett, et al., and had all the evidence presented in *Pacelli I* and in the trial below

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6 The conspiracy count in the *Pacelli V* indictment alleged two overt acts in which Pacelli took part. One alleged a delivery of one kilogram of cocaine by Juan Serrano to Pacelli in August, 1971; the other alleged a delivery of two kilos of heroin by Sperling to Pacelli in November, 1971. The conspiracy count in the instant indictment alleged three overt acts involving Pacelli. One is the November, 1971 Sperling delivery alleged in the *Pacelli V* indictment. The second alleged a delivery of two kilos of heroin by Pacelli to Catino and John Fazzalari in September, 1971. The third alleged a one kilo heroin delivery by Pacelli to DeFranco and Fazzalari in December, 1971. This difference cannot be explained by the fact that the persons on trial in the *Sperling* trial were not on trial below because the indictment below did include an allegation of a Pacelli-Sperling transaction while Sperling was not a defendant below.

been introduced against them, it seems clear that the defendants could not successfully have objected that the proof established multiple conspiracies rather than a single conspiracy. One who deals in large amounts of narcotics is held to the knowledge that there is a large criminal organization which is making that deal possible, and one is liable as a co-conspirator even though one has no personal knowledge of the identity of many of the co-conspirators. *United States* v. *Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds*, —— U.S. ——, 42 U.S.L.W. 3646 (May 28, 1974); *United States* v. *Arroyo*, —— F.2d ——, slip opinion 2309 (2d Cir. March 22, 1974); *United States v. Sisca*, —— F.2d ——, slip opinion 3413, 3427-28 (2d Cir. May 10, 1974); *United States* v. *Cirillo*, —— F.2d ——, slip opinion 3297, 3323-26 (May 7, 1974). While defense counsel have argued that these cases represent a departure from the rule of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), to the effect that a defendant has a right not to be tried *en masse* for a conglomeration of distinct offenses committed by others, the *Bynum-Arroyo* line of authority only reflects judicial awareness of the fact that the narcotics business generally takes the shape of a joint criminal venture among many criminals. As Judge Mulligan has described it:

> The pattern is now familiar. Raw drugs in large quantities have to be imported and supplied. In this case the core operators Bynum and Cordovano, respectively, supplied the capital and the contact with the suppliers who provided the raw material. The raw drugs then had to be adulterated or cut, packaged and then resold to purchasers who eventually made them available to the victims. In more normal business ventures this would be described as a vertically integrated loose-knit combination. The point of course is that each level

of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other. This knowledge on the part of Bynum and Cordovano operating in the middle layer is obvious. The supplier defendants Birnbaum, Altamura, Feroldi, Tuzzolina, Coniglio and Mele could not reasonably suppose that the large amounts of raw cocaine and heroin received by Bynum and Cordovano were not to be resold at the tremendous profits this business produces. The defendants Wright, Small, Mitchell, Garnett and Dyson who participated in the cutting, repackaging and distribution of the drugs understood fully the roles of Bynum and Cordovano and that suppliers of the raw drugs had to be involved. This is the usual chain conspiracy encountered in drug cases. "Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole." United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir.), cert. denied, 344 U.S. 864, 73 S.Ct. 105, 97 L.Ed. 670 (1952), quoting United States v. Bruno, 105 F.2d 921, 922 (2d Cir.), rev'd on other grounds, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939). See also Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947); United States v. Vega, 458 F.2d 1234 (2d Cir. 1972); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). The

fact that not all of the defendants may have known and worked directly with all of the others is not significant since it is clearly established that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business. United States v. Calabro, 467 F.2d 973, 982-983 (2d Cir. 1972), cert. denied, 410 U.S. 926, 93 S.Ct. 1358, 35 L.Ed.2d 587 (1973).

485 F.2d at 495-96.

Neither has the classical distinction between simple chain and hub-spoke conspiracies held up well in the area of narcotics conspiracy, for where two or more chains are connected to a hub by core conspirators this court has not hesitated to view the entirety as a single conspiracy. *Bynum; Arroyo; Sisca.*

This view of the narcotics business cannot be confined to the context of the *Kotteakos* issue. The government cannot argue that the courts must take a broad view of the scope of a conspiracy for the purpose of *Kotteakos* and a narrow view of the offense for the purpose of answering the ultimate question in this double jeopardy claim: is the conspiracy below the same offense as that for which appellant was convicted in *Pacelli I*?

The traditional "same offense" test focuses on the evidence adduced. Offenses are the "same" for the purposes of the double jeopardy guarantee when "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other." *United States* v. *Kramer,* 289 F.2d 909, 913 (2d Cir. 1961).[7]

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7 We recognize that in recent years the "same offense" test has "been subject to serious criticism," *see United States* v. *Cioffi,* 487 F.2d 492, 496-98 (2d Cir. 1973), with some favoring a looser "policy of fairness"

This same evidence test is difficult to apply in determining whether one criminal conspiracy is the same as a second criminal conspiracy. The essence of the charge is the criminal agreement to merchandise narcotics. The same agreement may be established by different aggregations of proof. Appellant is hard pressed to show that he could have been convicted under the indictment below on the basis of the evidence introduced in *Pacelli I*, when the overt acts specified in *Pacelli I* were distinct from the overt acts charged below. But because there are no doubt many overt acts which the government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements. In part for this reason, courts have been wary of applying a strict same evidence test in the context of criminal conspiracy. In *Short* v. *United States*, 91 F.2d 614, 624 (4th Cir. 1937), the court rejected reliance on the overt acts alleged, stating:

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of

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standard which would require the government to try together all offenses arising out of a single transaction or scheme and bar successive prosecutions of such offenses on grounds of double jeopardy, even though the evidence required to support a conviction for one offense might differ in some respects from that supporting another. *See Abbate* v. *United States*, 359 U.S. 187, 196, 201 (1959) (separate opinion of Justice Brennan); *Ashe* v. *Swenson*, 397 U.S. 436, 448 (1970) (concurring opinion of Justice Brennan, joined in by Justices Douglas and Marshall). However, since we conclude that the government in this case has failed to satisfy the stricter traditional test, it becomes unnecessary to decide whether a different standard should be applied here.

> time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

See also, United States v. *Cohen*, 197 F.2d 26 (3d Cir. 1952); *Arnold* v. *United States*, 336 F.2d 347 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965); *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969).

Here, the alleged two conspiracies occurred in the same general location at the same general time. One involved a large-scale narcotics ring; the known co-conspirators in the other transaction were foot soldiers. We know that a core member of the large-scale operation participated in both transactions, and that the narcotics business is such that it is likely that the foot soldiers were backed up by a larger organization. Moreover, Beverly Jalaba, one of the foot soldiers in *Pacelli I*, was Pacelli's mistress; so close to Pacelli, it is also likely that she was close to his organization.

We think that these facts are sufficient to satisfy appellant's burden of going forward, of putting his double jeopardy rights at issue. At this point, the burden shifts to the government to rebut the presumption, which the facts in this case support, that Papadakos, Possas and Jalaba were part of the Pacelli/Sperling organization.

Besides pointing to the literal differences between the named co-conspirators, the overt acts alleged, and the time frames of the two conspiracies, reliance on each of which is unjustified as shown, the government points to a footnote in *Pacelli I, United States* v. *Pacelli*, 470 F.2d at 68, n. 2:

> 2. In response to Lepore's question about the source of the heroin, Possas said it came from "Vinnie the Italian." She did not know his last name but said that she had been invited to his wedding and could get his name from the wedding invitation. Possas explained that Vinnie and her boyfriend Papadakos were partners in a heroin distributing ring which supplied customers from Chicago and Detroit. Upon Lepore's request that she call Vinnie, Possas dialed a number registered to Beverly Jalaba, Vinnie's fiancee. She said, "Hello, Vinnie, this is Lisa. My man will take the half," and "Okay, I will see you later." Lepore called Possas at home later that day to get Vinnie's last name. Possas checked the invitation and told Lepore that it was Pacelli.

The government contends that this is probative of the difference between the two conspiracies because there was no proof introduced below that sales of narcotics extended to Chicago and Detroit. However, the government did not attempt either in *Pacelli I* or in the trial below to define the geographical scope of the conspiracies.

Thus, the evidence of distinctness to which the government points is not considerable. Unlike the situation in *United States* v. *Aviles*, 274 F.2d 179, 193-94 (2d Cir.), *cert. denied*, 362 U.S. 974, 982 (1960), it is not at all clear in this case whether there is any difference between the two conspiracies with respect to such key factors as the

"principals, the source of their drugs, the means and places of importation, their distribution points, and the centers from which they operated in Manhattan." 274 F.2d at 194. We conclude, then, that the government has not rebutted the presumption raised by appellant, that the two conspiracies of which he has been convicted are in fact one conspiracy, and we reverse the conviction below on the conspiracy count. Of course, this does not mean that a person once tried for conspiring to violate the narcotics laws can never be tried for another similar offense. In many cases, there may be nothing indicating any connection between the parties or agreements. *See, e.g., United States* v. *Aviles, supra; United States* v. *McCall,* 489 F.2d 359 (2d Cir. 1973); *United States* v. *Edwards,* 366 F.2d 853 (2d Cir. 1966), *cert. denied,* 386 U.S. 908 (1967); *Dryden* v. *United States,* 403 F.2d 1008 (5th Cir. 1968). Of course, the element of time will be of considerable importance in that determination. Intervening factors may also be present; the government may well be able to demonstrate that one conspiracy surely ended before another began. The admissions of the defendant may also be relevant. *See e.g., United States* v. *Pacelli,* 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied,* 410 U.S. 983 (1973); *Reid* v. *United States,* 177 F.2d 743 (5th Cir. 1949). Moreover, where the offense charged is conspiracy to violate federal law other than the narcotics laws, and thus where the offense is likely to be more akin to a "Mom and Pop" business than to a corporate enterprise and so *Kotteakos* retains more vitality, the defendant will bear a higher burden of proving that his double jeopardy right has been abridged. *Reid, supra; United States* v. *O'Dell,* 462 F.2d 224, 226-27, n. 2 (6th Cir. 1972); *United States* v. *Barzie,* 433 F.2d 984 (2d Cir. 1970), *cert. denied,* 401 U.S. 975 (1971); *United States* v. *Wilshire Oil Co. of Texas,* 427 F.2d 969, 976, n. 12 (10th Cir.), *cert. denied,* 400 U.S. 829

(1970). Neither do we suggest that in order to avoid double jeopardy problems of this kind that the government consolidate in one count conspiracy cases which it might have brought separately, for that practice might raise *Kotteakos* problems.

If more than one narcotics conspiracy is known to exist, charges may be brought in separate counts. If separate conspiracies become known at different times and are prosecuted separately, prosecutors should be prepared to demonstrate from the proof at the two trials that the criminal agreements are indeed separate and distinct.

In any case, separate indictments on substantive counts are always available, without double jeopardy problems.

In holding that the United States has not established that the conspiracy proved in *Pacelli I* and the conspiracy proved below are not one and the same, we would recall Justice Jackson's warning in *Krulewitch* v. *United States*, 336 U.S. 440, 445-46 (1949):

> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle to expand itself to the limit of its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

But given the broad definition of narcotics conspiracy adopted in our cases, and recognizing that the task of defining the scope of these conspiracies is somewhat akin to describing an elephant from touch, we conclude that appellant has been convicted twice for the same offense.

Substantive Counts

Pacelli was convicted below of two substantive counts, count two, of distributing heroin to Catino in September, 1971, and count six, of possessing heroin in November, 1971. He claims that his conviction on these counts violates his rights of due process and double jeopardy.

Appellant's first argument is that *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), as extended by *U.S. ex rel. Williams* v. *McCann*, 436 F.2d 103 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), bars his prosecution on counts two and six. In *Pearce*, the Court held that one who had won a reversal of a criminal conviction could be sentenced after retrial and conviction to a stiffer sentence than was meted out in the first trial only if the reasons for the imposition of a stiffer sentence affirmatively appeared in the record and were based on objective information concerning the defendant's identifiable conduct after the original sentencing proceeding. In *Williams*, this court recognized that the *Pearce* principle was applicable to enhanced charges as well as to enhanced sentences:

> [T]he sentencing judge is not the only official who may wreak vengeance upon a defendant for a successful attack on his first conviction. We have no quarrel with the proposition that prosecutorial vindictiveness can be no less an affront to those values we characterize as "due process" than judicial vindictiveness. *Pearce* would have application, if a prosecutor for no valid reason charged a defendant whose first conviction had been set aside, with a more serious offense based upon the same conduct.

436 F.2d at 105. Appellant contends that the prosecutor here has increased the charge against Pacelli by substituting counts two and six, involving heroin, for the sub-

stantive counts charged in *Pacelli II* and in *Pacelli III*, which involved only cocaine transactions. He contends that this substitution of heroin charges for cocaine charges was extremely prejudicial and that it was a vindictive reaction to appellant's embarrassing disclosure that the U.S. Attorney's Office had promised Lipsky immunity while purporting not to have done so.

This theory might have some force had the government, for example, added to a previous charge of distributing narcotics in violation of 21 U.S.C. §841 a charge of distributing that same narcotic to a minor in violation of 21 U.S.C. §845. That is not the case here. It is one thing to increase a charge from manslaughter to murder, and quite another to charge a defendant, subsequent to a successful appeal, with a second murder. In the words of *Williams*, "*Pearce* would have application if a prosecutor . . . charged a defendant whose first conviction had been set aside, with a more serious offense *based upon the same conduct*." 436 F.2d at 105 (emphasis added). Here, the heroin counts are based upon acts which are distinct from charges previously brought against appellant. The government's decision to prosecute appellant for counts two and six is well within the traditionally broad ambit of prosecutorial discretion.

Appellant next contends that the convictions on the substantive counts must be reversed because they violate an agreement he made with the government in *Pacelli III*. After appellant had disclosed the Lipsky promise, appellant and the prosecution agreed to a mistrial in *Pacelli III*. Pacelli claims that part of this agreement consisted of a promise by the government that he would not be retried on new counts based on information available to the government at the time of the agreement. He argues that the information upon which counts two and six are based

months in the case of count six and for 18 months in the case of count two, during which time the government indicted him several times without confronting him with these charges. He claims that the failure to include these charges in the earlier indictments precludes their use below.

To the extent that this argument is based on the Sixth Amendment right to a speedy trial or on Rule 48(b), it is foreclosed by *United States* v. *Marion*, 404 U.S. 307 (1971). To establish a violation of the Fifth Amendment right to due process, appellant must "at least show that [he] suffered actual prejudice in preparing a defense." *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972). Pacelli claims that the delay in bringing the charges made it impossible for him to counter Lipsky's testimony with alibi witnesses. This claim is too speculative and the evidence against appellant too weighty for us to conclude that the delay deprived appellant of a fair trial. *Iannelli, supra.*

Nor will we upset these convictions on the ground that this delay constituted prosecutorial harassment. Lipsky's testimony was not available to the government before *Pacelli I;* therefore, appellant cannot complain of the government's failure to include these charges in that indictment. *Pacelli IV* did not involve narcotics violations; joinder of these charges in that case might well have prejudiced appellant. Count six below is the same as count nine against appellant in *Pacelli V*, the *Sperling* trial, from which appellant was severed. Appellant can legitimately complain, then, only with respect to the failure to charge him with count two in *Pacelli II, III*, and *V*, and with count six in *Pacelli II* and *III*. Although the government has not explained why it chose not to charge Pacelli with these two counts in the earlier trials, we do not believe that where there has been no showing of prejudice

was then available to the government, that the promise was therefore breached and that the convictions must be reversed because (1) such a promise is specifically enforceable, and (2) his consent to the mistrial in *Pacelli III* is rendered void by the breach, and *Pacelli III* bars prosecution of counts two and six because of double jeopardy.

The promise appellant relies on is nowhere to be found. When defense counsel moved for a mistrial in *Pacelli III*, he spelled out for the court the terms of the agreement between appellant and the government. He stated several times that the agreement had four terms: (a) if *Pacelli II* (then on appeal), were affirmed, *Pacelli III* would be disposed of by *nolle prosequi;* (b) if *Pacelli II* were vacated or reversed, appellant could be retried on those charges along with the substantive charge in *Pacelli III;* (c) if *Pacelli II* were vacated or reversed, and if the government decided not to retry appellant on those charges, then it would also not retry appellant on the *Pacelli III* charges; (d) if appellant were retried on charges from either *Pacelli II* or *III*, and if he were convicted, the government would urge the sentencing court to impose a sentence of not more than 15 years. There is no mention whatsoever in the transcript of charges other than those involved in *Pacelli II* and *III*. The only indication of a promise concerning other charges is appellant's bare allegation, stated in an affidavit, that it was his understanding that he would not be "retried" on new counts based on information available to the government when the agreement was made.

In the light of the clearly limited agreement revealed in the record, we must reject appellant's argument.

Third, appellant urges that his conviction on the substantive counts should be reversed because the government waited to bring those charges against him for 13

this exercise of prosecutorial discretion is the type of action which the *Marion* court had in mind when it suggested that preindictment delay might invalidate a conviction if that delay were designed "to harass" a defendant. 404 U.S. at 325. Pacelli has not been charged with several offenses based on the same acts, and the charges which have been brought appear to have been well founded. Neither has appellant demonstrated that the delay is attributable to any motive other than that which is the *raison d'etre* of the prosecutor: to punish criminal behavior. *Contrast, Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *United States* v. *Hanna*, 347 F. Supp. 1010 (D. Del. 1972). In short, the multiplicity of indictments is more attributable to the multiplicity of appellant's criminal acts than to the bad faith of the government.

Finally, appellant argues that his conviction on count six below should be reversed because count six is identical to count nine of *Pacelli V*, the *Sperling* trial, and since he was brought to trial on that count once before, his conviction below violated his guarantee against double jeopardy. The record, however, clearly demonstrates that Pacelli requested severance and mistrial in *Sperling* so that he could give exculpatory testimony in favor of his own aunt and uncle, Antoinette and Frank Bassi, co-defendants in the *Sperling* trial, without taking the stand on his own behalf.[8] This request was not necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, and it therefore bars resort to the plea of former jeopardy. *United States* v. *Jorn*, 400 U.S. 470, 485 & n. 12 (1970); *United States* v. *Goldstein*, 479 F.2d 1061, 1067 (2d Cir. 1973). Appellant's attack on this consent to the mistrial, based on allegations concerning Pacelli's understanding or

8 Frank was convicted; Antoinette was acquitted.

misunderstanding of his counsel, is not supported by the record.

In sum, we affirm each of the convictions below except for the conspiracy conviction of appellant Pacelli, which we reverse for the reasons stated.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-706

VINCENT PACELLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-738

BENJAMIN MALLAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 503 F.2d 971.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1974.

On October 30, 1974, Mr. Justice Marshall denied petitioner Pacelli's application for an extension of time within which to petition for certiorari, on the ground that the request for extension had not been timely filed. Pacelli's petition for a writ of certiorari was filed on December 6, 1974. It therefore is substantially out of time under Rule 22(2) of the Rules of this Court, and it would have been out of time even had the application for an extension of time been granted.

Petitioner Mallah filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on November 12, 1974. The petition was filed on December 12, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Questions presented by petitioner Pacelli:

1. Whether the instant prosecution of petitioner is an impermissible attempt by the government to penalize petitioner for successfully appealing prior convictions.

2. Whether the instant prosecution violates an agreement between petitioner and the prosecutor by which a prior prosecution was terminated, and, if not, whether the double jeopardy clause bars prose-

cution of an offense that had been the subject of the prosecution terminated by agreement.

3. Whether petitioner was placed in a second jeopardy by being tried for narcotics transactions that were different from, but took place within a few months of, transactions for which he had been convicted.

4. Whether petitioner was impermissibly prejudiced by his joint trial on conspiracy and substantive counts.

Question presented by petitioner Mallah:

5. Whether petitioner's right to cross-examine the witnesses against him was unduly restricted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty, or property, without due process of law; * * *.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and * * * to be confronted with the witnesses against him; * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Mallah and Pacelli were convicted of conspiring to distribute, and to possess with intent to distribute, both heroin and cocaine, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A) (Count 1). Pacelli also was convicted of two substantive counts (Counts 2 and 6) of distributing, and possessing with intent to distribute, heroin.[1] Mallah was sentenced to a term of ten years' imprisonment, to be followed by three years' special parole, and fined $25,000. Pacelli was sentenced to concurrent terms of 15 years' imprisonment on each count, to be followed by three years' special parole, and was fined $75,000 and ordered to pay the costs of the prosecution. Pacelli's sentences will commence after he has completed a term of 20 years' imprisonment that he is presently serving for another violation of the federal narcotics laws. The court of appeals affirmed all convictions, with the exception of Pacelli's conviction for conspiracy; the court reversed that conviction on the ground that the conspiracy charged was the same as a conspiracy for which Pacelli previously had been convicted.

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[1] Both petitioners were acquitted on several substantive counts. Co-defendant Alfred DeFranco was acquitted on the single count in which he was charged. Co-defendants Alfred Catino and Barney Barrett, whose convictions were affirmed on appeal, have not sought certiorari.

Briefly summarized, the evidence at trial showed that petitioner Pacelli and Herbert Sperling were the central figures of a large organization that had as its purpose the purchase, dilution and distribution of substantial quantities of heroin and cocaine in New York City.[2] The alliance between Sperling and Pacelli, both of whom directed large numbers of confederates, was inspired by a mutual need for sources of illegal narcotics. Pacelli, having ready sources of cocaine, sold cocaine to Sperling for resale to Sperling's customers; Sperling, having ready sources of heroin, sold heroin to Pacelli for resale to Pacelli's customers. Petitioner Mallah, Sperling's partner, provided much of the financing for these operations.

Sperling was not a co-defendant below, since he and ten other co-conspirators had been convicted, following an earlier trial, on July 12, 1973 (the *Sperling* trial). Petitioner Pacelli was originally a co-defendant in the *Sperling* trial, but on his motion he was granted a severance at the end of the govern-

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[2] A detailed summary of the trial record, which is voluminous, is set forth in the government's brief in the court of appeals (pp. 1-38). The main witness against Pacelli was Barry Lipsky, his principal accomplice (Tr. 56-558), *e.g.*, Tr. 118-119, 126-127, 131-136. ("Tr." designates petitioner Mallah's Appendix in the court of appeals.) Lipsky's testimony against Pacelli was corroborated chiefly by Susan Weyl (*e.g.*, Tr. 559-569), who testified that Pacelli and Lipsky began to "cut" and store heroin and cocaine in her apartment in November or December 1971.

ment's case so that he could testify on behalf of two of his co-defendants.[3]

With the exception noted below at p. 12, the court of appeals considered and rejected the contentions made here by petitioners.

ARGUMENT

I. *Pacelli* v. *United States*, No. 74-706.

The history of Pacelli's prior prosecutions in the Southern District of New York is, in large part, the basis of the claims asserted here. The first relevant prosecution occurred in February 1972 (*"Pacelli I"*), when Pacelli was convicted of conspiring to deal in narcotics and of two substantive cocaine violations.[4] The conviction was affirmed. *United States* v. *Pacelli*, 470 F.2d 67 (C.A. 2), certiorari denied, 410 U.S. 983. Barry Lipsky, the chief witness against Pacelli in the instant case, did not testify in *Pacelli I*.

Pacelli was convicted again of conspiracy and substantive cocaine violations in June 1972 (*"Pacelli II"*). In testifying against Pacelli in that case, Lipsky stated that the government had promised him nothing in return for his testimony. In December 1972, while the appeal from that conviction was

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[3] Petitioner Mallah, a fugitive at the time of the *Sperling* trial, was apprehended in August 1973.

[4] In reversing Pacelli's conspiracy conviction in the instant case, the court of appeals held that he had been convicted of a conspiracy essentially the same as that charged in *Pacelli I* (Pacelli Pet. App. 5491-5502).

pending, Pacelli was tried for other substantive cocaine offenses (*"Pacelli III"*). Lipsky testified for the prosecution and again stated that the government had made no promises, but defense counsel proved, by introducing a tape recording, that a government attorney had promised Lipsky that he would not be prosecuted for "any information that comes out of his mouth, this case or any other case" (Pet. App. 5491). After this disclosure had been made, the trial was recessed while counsel for Pacelli and the government negotiated. An agreement was reached; in exchange for the government's promises (stated on the record) that

> (a) if *Pacelli II* (then on appeal), were affirmed, *Pacelli III* would be disposed of by *nolle prosequi*; (b) if *Pacelli II* were vacated or reversed, appellant could be retried on those charges along with the substantive charge in *Pacelli III*; (c) if *Pacelli II* were vacated or reversed, and if the government decided not to retry [Pacelli] on those charges, then it would also not retry [Pacelli] on the *Pacelli III* charges; (d) if [Pacelli] were retried on charges from either *Pacelli II* or *III*, and if he were convicted, the government would urge the sentencing court to impose a sentence of not more than 15 years [Pet. App. 5505][,]

Pacelli agreed to the declaration of a mistrial in *Pacelli III*. The government informed the court of appeals of the undisclosed promises to Lipsky, and

that court vacated and remanded the conviction in *Pacelli II* (Pet. App. 5491).

Pacelli was convicted again in May 1973 (*"Pacelli IV"*), this time on charges related to the murder of Patsy Parks, who had been subpoenaed to give information relating to Pacelli's activities (Pet. App. 5481). Testifying against Pacelli, Lipsky disclosed the government's promise to him. The conviction was reversed on appeal, 491 F.2d 1108, because of improper admission of certain hearsay evidence and Jencks Act violations, and Pacelli's petition for a writ of certiorari (No. 73-1488), challenging federal jurisdiction over the offense, was denied on October 15, 1974.[4]

Pacelli was a defendant in the *Sperling* case in July 1973 (*"Pacelli V"*), but at his own request his case was severed because several defendants indicated that they wished to call him as a witness. In February 1974 Pacelli was tried in the instant case (*"Pacelli VI"*) and convicted for his part in the Sperling-Pacelli operations.

1. Petitioner Pacelli contends (Pet. 7-11) that the government's decision to try him in *Pacelli VI*, on "serious" counts involving heroin, was a vindictive reaction to his disclosure during *Pacelli III* of the agreement between Lipsky and the government, which allowed him to escape conviction in *Pacelli II* and *III*. Pacelli supports his argument by noting that the government could have charged him with these

[4] Subsequent to the filing of this petition, Pacelli has again been convicted on the murder charge of *Pacelli IV*.

heroin offenses as early as *Pacelli II* and that his prosecution here must therefore be an attempt to "increase" the charges alleged in *Pacelli II* and *III*, which involved only cocaine offenses.

North Carolina v. *Pearce*, 395 U.S. 711, held that a judge may not penalize a defendant for taking a successful appeal by giving him a longer sentence after a second trial. In *United States ex rel. Williams* v. *McMann*, 436 F.2d 103, certiorari denied, 402 U.S. 914, the Second Circuit held that the *Pearce* principle applies as well to prosecutorial vindictiveness in the enhancement of charges. Cf. *Blackledge* v. *Perry*, 417 U.S. 21. But these cases do not support petitioner, because the record here is devoid of evidence of vindictiveness. As the court of appeals stated (Pet. App. 5504; emphasis in original):

> In the words of *Williams*, "*Pearce* would have application if a prosecutor . . . charged a defendant whose first conviction had been set aside, with a more serious offense *based upon the same conduct*." 436 F.2d at 105 (emphasis added). Here, the heroin counts are based upon acts which are distinct from charges previously brought against [petitioner]. The government's decision to prosecute [petitioner] for counts two and six is well within the traditionally large ambit of prosecutorial discretion.

Petitioner's contention that the *Pacelli VI* charges should have been included in one of the earlier indictments (*Pacelli I* to *III*), and that the failure to do so constitutes improper prosecutorial harassment,

is inaccurate. The heroin offenses charged here are not based on the same conduct involved in the earlier cases, and the government was entitled to bring the separate charges to trial separately, in order to avoid having a single, unnecessarily long and complex multi-defendant trial that might overburden and confuse the jury, and in which the multiplicity of crimes alleged might unnecessarily prejudice either Pacelli or his co-defendants. The delay required to bring the charges serially was fully justified and did not deny Pacelli a fair trial (Pet. App. 5506). Cf. *United States* v. *Marion*, 404 U.S. 307.

> Pacelli has not been charged with several offenses based on the same acts, and the charges which have been brought appear to have been well founded. Neither has [petitioner] demonstrated that the delay is attributable to any motive other than that which is the *raison d'etre* of the prosecutor: to punish criminal behavior. * * * In short, the multiplicity of indictments is more attributable to the multiplicity of [petitioner's] criminal acts than to the bad faith of the government [Pet. App. 5507].

2. Petitioner also contends (Pet. 11-15) that his conviction must be reversed because the prosecution is in violation of the agreement reached in *Pacelli III* (see page 7, *supra*). According to petitioner, the agreement made during *Pacelli III* incorporated a promise by the government that he would not be retried on charges *different* from those alleged in *Pacelli II* and *III*. He asserts alternatively that his

consent to the mistrial in *Pacelli III* was void and that, jeopardy having attached in *Pacelli III*, his trial below on the heroin charges was barred by the Double Jeopardy Clause.

Petitioner's argument concerning the scope of the agreement in *Pacelli III* is at variance with the record. As the court below concluded, this agreement was confined to disposition of the charges in *Pacelli II* and *III*; it had nothing to do with the bringing of different charges based on different conduct (Pet. App. 5505):

> The promise [petitioner] relies on is nowhere to be found. When defense counsel moved for a mistrial in *Pacelli III*, he spelled out for the court the terms of the agreement * * *. * * * There is no mention whatsoever in the transcript of charges other than those involved in *Pacelli II* and *III*. The only indication of a promise concerning other charges is [petitioner's] bare allegation, stated in an affidavit, that it was his understanding that he would not be "retried" on new counts based on information available to the government when the agreement was made.
>
> In the light of the clearly limited agreement revealed in the record, we must reject [Pacelli's] argument.

3. Even if Pacelli's argument—that the agreement resulting in the mistrial of *Pacelli III* is void—were well taken, it does not support his contention that the charges in *Pacelli VI* placed him in a second jeopardy. The *Pacelli III* charges involved cocaine transactions during October 1971 (Pet. 10). The counts on which

Pacelli was convicted in the instant case related to heroin transactions during September 1971 and November 1971. Completely different facts were necessary to prove these offenses, which involved different drugs at different times. Even under the most expansive reading of the Double Jeopardy Clause, the offenses were distinct criminal transactions. The same analysis applies to Pacelli's related contention that the former convictions in *Pacelli I*, or the mistrial and severance in *Pacelli V*, bar his conviction in this case.

4. Pacelli's final contention (Pet. 18-21) is that he was prejudiced by his joint trial on the conspiracy count (which the court below reversed) and the substantive counts. He argues (Pet. 18) that "extensive" evidence, which would have been inadmissible on the substantive counts, was introduced on the conspiracy count under the co-conspirator exception to the hearsay rule. However, petitioner did not make this argument in his brief to the court of appeals, and this Court need not consider it. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, even if petitioner had been indicted only on the substantive counts, the hearsay declarations would have been admissible because there was independent proof, apart from the hearsay evidence, that he was engaged in a joint criminal venture with the other defendants. The co-conspirator exception to the hearsay rule does not depend on the presence of a formal

conspiracy count.[6] And, assuming *arguendo* that testimony regarding the statements of co-conspirators would have been inadmissible, the record does not reveal any significant amount of this kind of evidence; petitioner does not point to a single specific example of allegedly "inadmissible" evidence used against him.[7]

Petitioner's reliance on *Price* v. *Georgia*, 398 U.S. 323, is misplaced. In *Price*—unlike the instant case—the conviction that the defendant was attacking (manslaughter) involved precisely the same conduct as did the joined but jeopardy-barred count (murder). The Court emphasized that, as a matter of jury psychology upon which the record could shed no light, trial on the greater offense might have enhanced the chance of conviction on the lesser included offense. As the Court noted (398 U.S. at 331), it could not "determine whether or not the murder

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[6] See *United States* v. *Olweiss*, 138 F.2d 798, 800 (C.A. 2) (Hand, J.), certiorari denied, 321 U.S. 744: "The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

[7] Petitioner argues (see, *e.g.*, Pet. 7-10) that the question of his guilt on the heroin counts was close, because he was acquitted on all substantive counts involving cocaine, a result he attributes to the jury's greater abhorrence of heroin. A more likely explanation was suggested by the court of appeals (Pet. App. 5483): "Pacelli * * * was acquitted on substantive counts where Lipsky was not corroborated."

charge against [the defendant] induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." In the instant case the jeopardy-barred charge is dissimilar to the other charges, and the record does shed light on the issue of prejudice and disproves petitioner's claims.[8] See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2), certiorari denied, 383 U.S. 913.

II. *Mallah* v. *United States*, No. 74-738.

Petitioner Mallah's contentions are answered by the court of appeals, on whose opinion we rely (Mallah Pet. App. 5a-10a).

1. Petitioner Mallah contends (Pet. 6-9) that the trial court improperly limited the scope of his cross-examination of Joseph Conforti, a co-conspirator who testified for the government. This claim is insubstantial.

On direct examination Conforti admitted participating in a scheme to extort money from Sam Kaplan by threatening to testify against him in the Sperling trial.[9] After extensive cross-examination regarding the circumstances of the threat, petitioner's counsel

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[8] The heroin counts that petitioner now attacks were one distinct segment of the broad range of activities covered by the conspiracy count below, and, as we have shown, the evidence going to the conspiracy count would have been admissible even in the absence of such a count.

[9] This threat was never carried out, and Kaplan was acquitted.

sought to introduce in evidence a tape recording of the telephone conversation during which the threat was made.

The trial judge properly excluded this collateral evidence.[10] Since the extortion threat was directed solely against Kaplan, who was not a defendant below, the disputed evidence was "inadmissible, extrinsic proof of Conforti's bad character" (Pet. App. 7a). Moreover, as the court below stated (*ibid.*):

> * * * Conforti's admission to participating in the extortion plot shed a good deal of light on his credibility. The disputed evidence would have added little additional candle power but, considering the confused and obscene character of the taped conversation and the fact that the evidence concerning the date of Spada's death would have been protracted, might well have distracted the jury.

Cf. McCormick, *Evidence* 83-84 (1972 ed.).[11]

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[10] Although it excluded the tape recording, the district court ruled that counsel could conduct further cross-examination on the basis of various statements made by Conforti in phone conversations with Kaplan, but only as to matters unconnected with the extortion attempt. Cross-examination then continued concerning the extortion threat as well as other matters. Petitioner's counsel was aided in this cross-examination by the transcript of the tapes, which was used to refresh Conforti's recollection and quoted *verbatim* in formulating the questions put to Conforti (Tr. 802-839).

[11] Contrary to petitioner's suggestion (Pet. 8), the court of appeals correctly determined that proof of the relevant dates would have been protracted. Petitioner wanted to show that Conforti did not act as Spada's agent by proving that Spada's death and the Conforti-Kaplan conversation both occurred on

2. Petitioner makes a similar argument (Pet. 9-10) with respect to the trial court's refusal to allow him to cross-examine Barry Lipsky about the details of the murder of Patsy Parks, a crime committed by Pacelli with Lipsky's assistance. Lipsky admitted in the trial below that he had been indicted for this murder in Nassau County, Florida (Tr. 58, 187); that the federal government, in exchange for his cooperation, assisted him in getting the state authorities to accept a plea to first-degree manslaughter (Tr. 57, 462, 476-478, 481); that, consequently, he was sentenced to an indeterminate term of up to twenty years, for which parole was immediately available (Tr. 58); and that he expected that the parole board would be told of his cooperation (Tr. 179, 491-492).

Petitioner was not entitled to question Lipsky about the details of the murder. The court of appeals soundly balanced the interests at stake (Pet. App. 9a):

> While the details of the murder are relevant both to Lipsky's motivation and to his mental competence, the introduction of this evidence might well have confused the jury and might

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October 28, 1973. Proof of these dates, particularly the date of the conversation, would not have been easy. Petitioner's counsel conceded that the purported date of the conversation could not be established from the tape; he therefore proposed to call Kaplan, or some other witness, to testify on the matter. Of necessity, the government would have been required to counter such evidence. Accordingly, the trial judge acted well within his discretion in preventing this excursion into collateral issues.

> also have prejudiced the case against appellant Pacelli, whose involvement in the murder could have been revealed in the telling. Moreover, the jury did have before it sufficient evidence concerning Lipsky's credibility to make a discriminating appraisal of him.

As the court further observed, the judge instructed the jury that Lipsky's testimony was "inherently suspect", and the jury—which acquitted petitioner's co-defendants on all counts where Lipsky was not corroborated—indicated its agreement with that view. In light of these circumstances, the restriction on investigation of these collateral matters was "neither prejudicial nor erroneous" (Pet. App. 10a).[12] Such restrictions traditionally are within the informed discretion of the trial court, and that discretion was not abused here. See *United States* v. *LaSorsa*, 480 F.2d 522, 528-529 (C.A. 2), certiorari denied, 414 U.S. 855; *United States* v. *Blackwood*, 456 F.2d 526, 529-530 (C.A. 2), certiorari denied, 409 U.S. 863.

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[12] Even apart from the testimony of Conforti and Lipsky, the evidence against Mallah was compelling (see, *e.g.*, Pet. App. 4a).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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